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Supreme Court, U.S.
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CASE NO. 91-

In The

SUPREME COURT Of The UNITED STATES

October Term, 1990

DEXTER LEHTINEN,

Petitioner,

vs.

S.J. and W. RANCH, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether the recently amended Federal Tort Claims Act, 28 U.S.C. § 2679(d), grants the federal district courts jurisdiction to overrule a certification by the United States Attorney General that a federal employee was acting within the scope of employment and, thereafter, to adjudicate purely state law tort claims against that employee.

(2) Whether an appellee on appeal may seek to modify the rationale and relief granted to a co-appellee by a district court order without filing a cross appeal challenging that order.

LIST OF PARTIES TO THE PROCEEDING

The following is a list of the parties appearing in the proceedings:

1. Dexter Lehtinen (Defendant/ Appellee/Petitioner)

2. The United States of America (Defendant/Appellee)

3. S.J. and W. Ranch, Inc. (Plaintiff/Appellant/Respondent)

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2. S.J. and W. Ranch v. Lehtinen, 913 F.2d 1538 (11th Cir. 1990)

3. S.J. and W. Ranch v. Lehtinen, 924 F.2d 1555 (11th Cir. 1991)

STATEMENT OF SUPREME COURT JURISDICTION

The opinion of the United States Court of Appeals, Eleventh Circuit, was entered on October 10, 1990; and the motion for rehearing was denied on February 8, 1991. The Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to review the case by writ of certiorari because the "court of appeals has rendered a decision in direct conflict with the decision of other courts of appeal on the same matter." Rule 10, Rules of the Supreme Court of the United States. Compare Mitchell v. Carlson,

896 F.2d 128 (5th Cir. 1990); and Aviles v. Lutz, 887 F.2d 1046 (10th Cir. 1989) with Melo v. Hafer, 912 F.2d 628 (3d Cir. 1990).

FEDERAL STATUTE INVOLVED

28 U.S.C. § 2679 Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by section 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any

employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government-

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized. . . .

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant

employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the

action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1),(2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions . . . .

STATEMENT OF THE CASE

This case arose from a lawsuit filed by the Respondent corporation, S.J. and W. Ranch, Inc., alleging libel, slander and invasion of privacy against Dexter W. Lehtinen, the United States Attorney for the Southern District of Florida. The complaint attacked statements reportedly made by U.S. Attorney Lehtinen at a press conference held to announce his office's filing of civil forfeiture actions against three large ranches near Lake Okeechobee, Florida. The ranches had been used for airplane landing sites by drug dealers. The Respondent corporation owned one of the ranches.

On December 8, 1988, the United States Attorney General's office certified, pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C.

§ 2679(d), that U.S. Attorney Lehtinen was acting within the course and scope of his employment at the time of the press conference. The United States then sought to remove the action to federal court pursuant to 28 U.S.C. § 1446 and 28 U.S.C. § 2679(d)(2) and to substitute the United States as defendant pursuant to 28 U.S.C. § 2679(d) which requires such substitution whenever the Attorney General certifies that a federal employee was acting within his scope of employment. The Respondent corporation countered by filing a motion to remand the case to state court claiming that removal of the case and substitution of the United States as defendant based upon the Attorney General's certification violated its rights to due process.

Before the district court ruled on any of the pending motions, the United States filed a motion for summary judgment requesting the district court to dismiss all claims against U.S. Attorney Lehtinen and the United States for lack of subject matter jurisdiction. The Respondent corporation opposed the motion by reasserting its due process claims and by alleging a single issue of disputed "fact" - whether U.S. Attorney Lehtinen was acting within the scope of his employment as certified by the Attorney General's office when he held a press conference to announce the civil forfeiture actions brought by his office.

The district court entered its final order on August 9, 1989, granting the United States' petition for removal and its motion to be substituted as defendant and dismissing all claims

against both U.S. Attorney Lehtinen and the United States for lack of subject matter jurisdiction under 28 U.S.C. §§ 1346(b), 2680(h). S.J. and W. Ranch v. Lehtinen, 717 F.Supp. 824 (S.D. Fla. 1989).

Respondent appealed to the U.S. Court of Appeals, Eleventh Circuit. After commencement of the appeal, the United States Attorney General's office advised U.S. Attorney Lehtinen that it would no longer support the rationale and relief granted by the district court's order because of certain opinions expressed by a representative of the Attorney General's office during congressional subcommittee hearings on the FTCA which suggested that the Attorney General's certification might be subject to judicial review by the district court. Accordingly, U.S. Attorney Lehtinen had to engage his own

outside private counsel to defend the relief granted to him by the district court's final order.

Although changing its initial position and directly challenging the rationale and relief granted by the district court's final order, the United States did not file a cross appeal but, instead, waited until after U.S. Attorney Lehtinen had filed his answer brief and then raised its new interpretation of the FTCA by an "answer brief" of its own. U.S. Attorney Lehtinen responded to the United States' "answer brief" by filing a motion to strike its belated challenge to the district court's order without filing a cross appeal.

After oral argument, the court of appeals' decision rejected U.S. Attorney Lehtinen's motion to strike, reversed

the district court's final order and remanded the case to permit the Respondent corporation "full discovery on the scope question" so that the district court could make its own "independent review" at a "de novo hearing" of the Attorney General's determination that U.S. Attorney Lehtinen was acting within the scope of his employment when he held a press conference to announce the civil forfeiture actions filed by his office. S.J. and W. Ranch, Inc. v. Lehtinen, 913 F.2d 1538 (11th Cir. 1990).

The court of appeals' original opinion concluded that the case should be remanded to state court if the district court overruled the Attorney General's certification. Because this conclusion was directly contrary to the FTCA's express provision that the certification would "conclusively

establish scope of office or employment for purposes of removal," the court deleted it in a later amendment. S.J. and W. Ranch, Inc. v. Lehtinen, 924 F.2d 1555 (11th Cir. 1991).

This amendment, however, results in a judicial stalemate: the district court is unable to remand a state tort claim but still has no jurisdiction to adjudicate that purely state law claim itself under the FTCA. Petitioner's petition for writ of certiorari seeks resolution of this judicial stalemate by having the Supreme Court recognize the express provisions of the FTCA which prohibit the federal district courts from exercising jurisdiction once the Attorney General has made an affirmative certification and the state law tort claim is not permitted against the United States.

ARGUMENT

I. THE AMENDED FTCA EXPRESSLY AND CONCLUSIVELY REQUIRED THE DISTRICT COURT TO REMOVE RESPONDENT'S CIVIL ACTION AGAINST LEHTINEN AND TO SUBSTITUTE THE UNITED STATES AS DEFENDANT ONCE THE ATTORNEY GENERAL'S OFFICE ISSUED ITS CERTIFICATION ON SCOPE OF EMPLOYMENT

The Court of Appeals' view that Congress did not intend to preclude state tort claims against an individual federal employee where the Attorney General has issued a certification on scope of employment is contradicted by the plain language of the amended FTCA and by its official legislative history. Aviles v. Lutz, 887 F.2d 1046, 1049-1050 (10th Cir. 1989); and Mitchell v. Carlson, 896 F.2d 128 (5th Cir. 1990). Contra, Melo v. Hafer, 912 F.2d 628 (3d Cir. 1990). This view is also contrary to the clear and legitimate governmental objective embodied in the

amended FTCA of protecting federal employees from the protracted discovery and other disruptions of personal and professional life which attend modern tort litigation. Under the recently amended FTCA, the Attorney General's certification on scope of employment required the district court to remove Respondent's civil action and to substitute the United States as the party defendant. 28 U.S.C. § 2679(d)(2). Mitchell v. Carlson, 896 F.2d 128, 136 (5th Cir. 1990); Aviles v. Lutz, 887 F.2d 1046, 1049-1050 (10th Cir. 1989); and Moreno v. Small Business Admin., 877 F.2d 715, 716-717 (8th Cir. 1989). Thereafter, the district court was required to treat the case as one brought pursuant to the FTCA, with the sole jurisdictional basis for the suit being 28 U.S.C. § 1346. Pursuant to

that statute, the district court did not have subject matter jurisdiction over any claims against U.S. Attorney Lehtinen individually. Likewise, the FTCA's exclusion of intentional torts claims against the United States, including libel, slander and defamation, required the district court to dismiss all claims against the United States as well. Mitchell v. Carlson, supra at 126; and Aviles v. Lutz, supra, at 1049.

A. The Court of Appeals' Decision Totally Frustrates The Amended FTCA's Objective of Protecting Individual Federal Employees From The Disruptions of Protracted Tort Litigation.

The court of appeals decision concluded that under the amended FTCA the "district court erred in finding the Attorney General's scope certification non-reviewable" and ordered that U.S. Attorney Lehtinen be subjected to "a de

novo hearing" and "full discovery on the scope question." However, both the plain language and the official legislative history of the amended FTCA show that Congress has completely removed the scope of employment issue from the arena of such protracted litigation against individual federal officers and employees. Aviles v. Lutz, 887 F.2d 1046, 1049 (10th Cir. 1989); and Mitchell v. Carlson, 896 F.2d 128, 136 (5th Cir. 1990). See also, Moreno v. Small Business Admin., 877 F.2d 715, 716-717 (8th Cir. 1989).

On November 18, 1988, Congress amended the FTCA for the sole purpose of granting federal employees broad immunity from state law suits based on common-law tort claims. To ensure simple and quick termination of such litigation against an individual

employee, Congress provided a single, expeditions mechanism for substituting the United States as the defendant:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. (Emphasis added.)

28 U.S.C. § 2679(d)(2). Section 2679(d)(4) of the FTCA further provides that, upon the Attorney General's certification of scope, the sole

governing jurisdictional statute would thereafter be 28 U.S.C. § 1346, which requires the United States to be the defendant.

The amended FTCA repeatedly uses the mandatory "shall;" it requires both the removal of the civil action and the substitution of the United States as a defendant based solely upon the Attorney General's certification. There is no provision for any judicial review of the Attorney General's certification; and there is no provision which would authorize a district court to make an independent determination on the scope of employment issue at the behest of any tort plaintiff who might wish to force an individual federal officer or

employee into protracted litigation.[1/] To the contrary, the amended FTCA's statement of purpose and legislative history show that the Attorney General's scope of employment certifications were not subject to review at the request of a plaintiff. Mitchell v. Carlson, supra at 136; and Aviles v. Lutz, supra at 1049. As the Tenth Circuit concluded in Aviles v. Lutz:

> The mandatory language of subsection (d) does not permit us to challenge the attorney general's certification. Further, the House Report on the 1988 amendments to the FTCA unequivocally supports our conclusion that the United

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1/ An employee denied certification, may petition the district court "to find and certify that the employee was acting within the scope of his office or employment;" but this independent petition is an original action, not a review of the Attorney General's decision. 28 U.S.C. § 2679(d) (3). Contra, Melo v. Hafer, 912 F.2d 628 (3d Cir. 1990).

> States should be substituted as a defendant under § 2679 and then dismissed under § 2680. (Emphasis added.)

Id. at 1049.

Congress amended the FTCA to remove the risk of personal liability and professional disruptions which federal employees faced from common law tort actions. Historically, such suits had been routinely dismissed on absolute immunity grounds. However, a series of court decisions, culminating in the Supreme Court's decision in Westfall v. Ersin, ___ U.S. _____, 108 S.Ct. 580 (1988), steadily eroded that immunity. Public Law 100-694 § (a)(4); see also, H.R. Rep. 100-700, 100th Cong. 2d Sess., at 2 (1988) ("House Report"). Congress determined that as a result of Westfall and other recent court decisions, common law tort suits against individual

federal employees would present a substantially more lengthy, expensive and uncertain process than that encountered under earlier precedent. House Report at 3. Congress also concluded that this potential increase in liability "could lead to a substantial diminution in the vigor of Federal law enforcement and implementation." Id.

The amended FTCA, therefore, was enacted by Congress to eliminate Westfall's erosion of the protections afforded individual federal employees. Congress found that:

> [The] prospect of [personal] liability will seriously undermine the morale and well being of Federal employees, impede the ability of agencies to carry out their missions and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts.

P.L. 100-694 § 2(a)(6). Congress was also concerned that entanglement in the distractions of litigation, particularly modern discovery practice, would consume the time and energy of federal employees which ought to be devoted to job performance. House Report at 2-3. Thus, the amended FTCA found that:

> [T]his erosion of immunity of Federal employees from common law tort liability has created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal work force.

P.L. 100-694 § 2(a)(5). To correct this situation, Congress decided through legislation to immunize federal employees from personal liability, based on the doctrine of sovereign immunity. House Report at 2.

The immunity intended by Congress to relieve federal employees from the

burdens of litigation would not be effective if plaintiffs such as Respondent could still force an individual federal employee into protracted discovery and litigation over the scope of employment issue. To make scope of employment determinations simple, certain and swift, Congress gave the Attorney General's office sole decisional authority, except where a judicial determination is sought by the federal employees who are themselves the intended beneficiaries of the FTCA amendments. Mitchell v. Carlson, supra at 136.

B. The Court of Appeals Decision Totally Ignores That Congress Expressly Limited the Right to a Judicial Determination of Certification to Individual Federal Employees Thereby Precluding Such Judicial Action at the Behest of Any Other Parties.

The amended FTCA provides for judicial determinations on certification

only when certification is denied by the Attorney General and only when such a determination is requested by the federal employee who is the target of a suit. 28 U.S.C. § 2679(d)(3).[2/] In all other cases where the Attorney General grants certification, the amended FTCA provides that the certification "shall conclusively" result in removal and in substitution of the United States as the defendant.

2/ If the request for judicial certification is made in a state court case, the action would be removed for the purpose of allowing the federal district court to determine whether certification was proper. If certification is not granted, the case would be remanded. In all other cases where the Attorney General grants certification, the amended FTCA provides that the certification "shall conclusively establish scope of office or employment for purposes of removal" and "shall" result in a substitution of the United States as the defendant.

The district court below was correct in deciding that no review was available because, as the Supreme Court has held, "congressional intent to preclude review is 'fairly discernible in the statutory scheme.'" United States v. Fausto, 108 S.Ct. 668, 675 (1988), quoting Block v. Community Nutrition Institute, 467 U.S. 340, 351 1984) and Data Processing Service v. Camp, 397 U.S. 150, 157 (1970). In Block, the Supreme Court stated the principle of statutory construction applicable to this case as follows:

> When a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded (Emphasis added).

Block, 467 U.S. at 349. In Block, the Supreme Court found that consumers were

impliedly precluded from obtaining judicial review of milk marketing orders because the legislation expressly afforded judicial review only to milk handlers directly affected by such orders. Id. at 347-48. Similarly in the present case, Congress allowed district court certification only for federal employees who have been denied Attorney General certification. As in Block and Fausto, it is "fairly discernible" that under the amended FTCA, judicial review of the Attorney General's certification by any party bringing suit against a federal employee is precluded.

C. The Court of Appeals' Decision Completely Contradicts the Official Legislative History of the FTCA Contained in the House Report.

Contrary to the various comments made by certain persons at Congressional

subcommittee hearings relied upon by the court of appeals decision, the official legislation history of the FTCA embodied in the House Report clearly shows that the FTCA amendments would operate to preclude protracted discovery, hearings and other litigation on the Attorney General's scope certification:

> Section 6 would amend section 2679(d) of title 28 to require the United States to be substituted for a Federal employee as the defendant in a civil lawsuit whenever the Attorney General determines that the act or omission alleged to have caused the claimant's injuries was within the scope of the employee's office or employment. Once made, this determination also would require that any case filed in State court be removed to a Federal district court. If the Attorney General refuses to certify that an employee was acting within the scope of this office or employment, the employee is authorized to petition the Court for a ruling on this determination (Emphasis added).

House Report at 9. This official House Report is the most persuasive legislative history for purposes of showing Congressional intent, not the scattered excerpts taken by the panel opinion from subcommittee hearings. Accordingly, the legislative history likewise confirms that judicial review of a grant of scope certification at the request of a tort plaintiff is not permitted. Aviles v. Lutz, supra at 1049. As the Fifth Circuit concluded in Mitchell v. Carlson: "Isolated language found scattered throughout the legislative history is insufficient persuasion that Congress intended to frustrate the very purpose of the Westfall Act, to protect its employees from the distraction and burden of litigation based upon their employment activities." (Emphasis added) Id. at 136.

D. The Court of Appeals' View That The Present Case Should Be Subjected To Protracted Scope Litigation Completely Ignores The Express Congressional Mandate That The Attorney General's Certification Shall Conclusively Establish Scope For Purposes Of Removal.

Even if the Attorney General's grant of a scope certification were subject to judicial review at the behest of any plaintiff suing a federal officer or employee, the district court would have nevertheless been required to dismiss the present case for lack of subject matter jurisdiction. The FTCA amendments replace the FTCA's Drivers Act, 28 U.S.C. § 2679(b)-(d) which also provided that when the Attorney General certified that a federal driver had been acting within the scope of federal employment, the action would be deemed to be against the United States. If

filed in state court, the case would be removed to federal court. In this former statutory scheme, however, it was clear that judicial review of the "scope" decision was contemplated because the former 2679(d) expressly provided for a remand to state court whenever "a remedy by suit . . . is not available against the United States . . ," that is, whenever the district court determined that a driver acted outside the scope of federal employment. Vantrease v. United States, 400 F.2d 863, 855 (6th Cir. 1968). See Kelley v. United States, 568 F.2d 259, 266 n.5 (2d Cir. 1978). By contrast, the amended FTCA expressly precludes any remand when it states that: "The certification of the Attorney General shall conclusively establish scope of office or employment for purposes of

removal." (Emphasis added) 28 U.S.C. § 2679(d)(2). Under the amended FTCA, therefore, the only possibility for remand is if a federal employee petitions for a district court certification, obtains removal, and then loses the scope issue.

Once a case has been "conclusively" removed, moreover, the amended FTCA, expressly restricts the district courts' subject matter jurisdiction only to actions against the United States. Upon certification by the Attorney General, 28 U.S.C. § 2679 mandates that:

> any action or proceeding subject to paragraph (1) [actions filed in federal court where Attorney General has authority to certify scope], (2) [actions removed from state court where Attorney General has authority to certify scope], or (3) [actions where the district court has authority to certify scope after Attorney General's denial] shall proceed in the same

> manner as any action against the United States filed pursuant to 28 U.S.C. § 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions. (Emphasis added.)

The district court, therefore, would not have subject matter jurisdiction over any claim against the individual defendant whose actions gave rise to the claim. Mars v. Hanberry, 752 F.2d 254 (6th Cir. 1985); Davis v. United States, 667 F.2d 822 (9th Cir. 1982) and Maxwell v. First National Bank of Jacksonville, 638 F.2d 32, 35 (11th Cir. 1981).

Thus, contrary to the court of appeals' implicit view that the district court could adjudicate the state law tort claim, the district court would necessarily have had to dismiss the present case even if the court reversed the Attorney General's scope of employment certification for purposes of the

merits of the case. By removing the United States as a defendant, the court would deprive itself of jurisdiction under 28 U.S.C. § 1346, but would be unable to remand the case because the FTCA now provides that the Attorney General's certification "shall conclusively establish scope of office or employment for purposes of removal." (Emphasis added) 28 U.S.C. § 2679(d)(2). Because the parties are not diverse, the court would not have diversity jurisdiction under 28 U.S.C. § 1332 even if the district court chose to ignore the legislative jurisdictional limitations imposed by the FTCA. Likewise, state common-law torts, by definition, do not involve federal questions under 28 U.S.C. § 1331. Without any jurisdictional basis to decide the suit - under FTCA, diversity or federal

question - and with no authority to remand, because the FTCA provides that the Attorney General's certification "shall conclusively establish scope of office or employment for purposes of removal," the district court would have had to dismiss the case with prejudice even if the Respondent succeeded in obtaining the "full discovery," "de novo hearing," judicial review and reversal of the Attorney General's certification on scope of employment as contemplated by the court of appeals decision.[3/]

3/ It should also be noted that Respondent offered nothing in response to the United States' motion for summary judgment which would counter the Attorney General's certification of scope of employment other than its conclusory assertions that the U.S. Attorney's official press conference to announce his office's civil forfeiture actions was somehow not within the scope of his office or employment. The District Court's order, therefore, can be sustained on this basis alone. See Wilkins v.

(Footnote continued on next page.)

The court of appeals' reliance upon the reasoning in Arbour v. Jenkins, 903 F.2d 416 (2d Cir. 1990), is completely misplaced because Arbour involved a federal claim and did not involve the unique jurisdictional situation posed by the removal of a state action based upon a scope of employment certification which "conclusively established" that issue as a matter of statutory law. The purported "ambiguity" in the legislative enactment found by the Arbour court is

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(Footnote continued from previous page.) American Export Isbrandtsen Lines, Inc., 446 F.2d 480, 484 (2d Cir. 1971), cert. denied, 404 U.S. 1018 (1972) (burden on plaintiff to prove actions outside scope of employment). The Court of Appeals' decision did not even require a prima facie showing that the Attorney General's certification was incorrect but ordered "full discovery" and a "de novo hearing."

Arbour court is simply not present in the FTCA provisions governing removal actions which clearly preclude judicial review of the Attorney General's scope certification and clearly preclude the district courts from adjudicating purely state law tort claims where the United States is not a party defendant.

II. AS AN APPELLEE SEEKING TO MODIFY THE RATIONALE AND RELIEF GRANTED A CO-APPELLEE, THE UNITED STATES WAS REQUIRED TO FILE A CROSS APPEAL

The court of appeals' decision reversing the district court was not entered at the request of Respondent, but rather at the sole request of the appellee United States. The decision, moreover, was entered based upon the United States' answer brief, not in response to a cross appeal. Thus, Petitioner Lehtinen was compelled to

respond to the United States answer brief by a motion to strike and to share oral argument with the United States despite the fact that this co-appellee was arguing to destroy the protections afforded Petitioner by the FTCA and the district court's order.

Petitioner Lehtinen reasserts his position that the United States was seeking to modify the entire rational and relief granted to him by the district court and, accordingly, was barred from making its challenge by filing a belated "answer brief" rather than by filing a cross appeal. Dariso v. K-mart No. 4195, Div. of S.S. Kresge Co., 559 F.2d 1275, 1278 (5th Cir. 1977); 9 Moore's Federal Practice, 2nd Ed.§ 204.11[2]-[4]; and FEA v. Algonquin Eng. Inc., 426 U.S. 548, 96 S.Ct. 1195, 49 L.Ed. 2d 49 (1976). The extreme

prejudice to Lehtinen in having the United States not only abandon its legal representation of him in midstream but also collaterally challenging the district court's order by means of an "answer brief" rather than a cross appeal is obvious and should not be sanctioned. The issue is not, as the court of appeals decision frames it, whether matters ought to be brought to the appellate court's attention, but rather how such matters should properly be presented so as to avoid undue prejudice to other parties to the proceedings.

CONCLUSION

To resolve the conflicting decisions of the court of appeals, to reinstate the legislative mandate of the

FTCA and to effectuate the very protection of federal employees the Supreme Court contemplated in its Westfall decision, the Supreme Court should grant its writ of certiorari and summarily reverse the court of appeals decision. Scott v. Immigration and Naturalization Service, 87 S.Ct. 473, 385 U.S. 214, 17 L.Ed.2d 318 (U.S. 1966). Otherwise the disruptive situation addressed in Westfall and corrected by the FTCA will be reinstated by a federal court seeking to legislate its own scheme of tort litigation against federal employees.

Respectfully submitted,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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2. Decision of the United States Court of Appeals, Eleventh Circuit dated October 10, 1990, S.J. and W. Ranch, Inc. v. Lehtinen, 913 F.2d 1538 (11th Cir. 1990)

3. Amended Opinion of the United States Court of Appeals, Eleventh Circuit dated February 8, 1991 S.J. and W. Ranch, Inc. v. Lehtinen, 924 F.2d 1555 (11th Cir. 1991)

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App. 1

S.J. AND RANCH, INC., Plaintiff,

v.

Dexter LEHTINEN, Defendant,

No. 88-14213-CIV

United States District Court,
S.D. Florida

Aug. 9, 1989.

Action was brought in state court against United States attorney alleging libel,slander and invasion of privacy. Action was removed to federal court. Defendant moved for summary judgment. The District Court, Gonzalez, J., held that: (1) United States Attorney General's certification that United States attorney was acting within course and scope of his employment at time he made allegedly defamatory statements was not subject to judicial review; (2) district court had no subject matter jurisdiction under Federal Tort Claims

Act over claims arising out of intentional torts of libel and slander; and (3) Federal Tort Claims Act amendments protecting federal employees from liability comport with requirements of substantive due process.

Claim dismissed.

1. United States - 78(9)

United States Attorney General's certification that United States attorney was acting within course and scope of his employment at time he made allegedly defamatory statements was not subject to judicial review under the Federal Tort Claims Act. 28 U.S.C.A. §§ 1346(b), 2671 et seq., 2679, 2679(b)(1), (d)(2, 3).

2. United States - 78(9)

District court had no subject matter jurisdiction under Federal Tort Claims Act over claims against United

States attorney arising out of intentional torts of libel and slander. 28 U.S.C.A. §§ 1346(b), 2680(h).

3. **Constitutional Law - 299(2)**

United States - 78(2)

For plaintiff to show that Federal Tort Claims Act amendments violate due process, plaintiff must show that challenged legislation is wholly arbitrary and irrational in purpose and effect. U.S.C.A. Const. Amends. 5, 14; 28 U.S.C.A. §§ 1346(b), 2671 et seq.

4. **Constitutional Law - 299(2)**

United States - 78(2)

Congress' conscious substitution of the United States as sole defendant in pending tort actions against federal employees was reasonably related to goal of enhancing vigor of federal law enforcement, and thus, Federal Tort Claims Act amendments protecting federal

employees from litigation and liability comported with requirements of substantive due process. U.S.C.A. Const. Amends. 5, 14; 28 U.S.C.A. §§ 1346(b), 2671 et seq., 2679, 2679(b)(1), (d)(2, 3).

Alan P. Dagen, Asst. U.S. Atty., Miami, Fla., for plaintiff.

J. David Pobjecky, Winterhaven, Fla., for defendant.

ORDER

GONZALEZ, District Judge.

THIS CAUSE has come before the court upon the defendant's Motion For Summary Judgment. The court has made an exhaustive review of the motion and has considered plaintiff's response and,

being otherwise duly advised finds as follows:

Procedural History

On November 21, 1988, plaintiff filed a lawsuit in the Florida Circuit Court in Okeechobee County, alleging libel, slander and invasion of privacy against Dexter Lehtinen, the United States Attorney for the Southern District of Florida. The Complaint stems from alleged slanderous and libelous statements Mr. Lehtinen made at a press conference on September 15, 1988.

On December 8, 1988, John J. Farley, III, Director of the Civil Division, Torts Branch, United States Department of Justice, certified, pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2679(d), that Mr. Lehtinen was acting within the

course and scope of his employment at the time he made the statements.

On December 9, 1988, the United States filed a Petition For Removal pursuant to 28 U.S.C. § 1446 and 28 U.S.C. § 2679(d)(2). The United States also filed a Motion To Substitute the United States as Defendant. On January 12, 1989, plaintiff filed a Motion To Remand claiming that permitting the Attorney General's certification of scope of employment to conclusively determine the substitution of the United States as a defendant violated plaintiff's right of due process and right to jury trial. Plaintiff requested an evidentiary hearing on the scope of employment issue.

On February 20, 1989, this Court entered an Order which, in effect, stayed all proceeding in the case except

for an inquiry into this Court's subject matter jurisdiction. This Court reserved ruling on the Motion To Substitute and the Motion to Remand and allowed the government to "intervene" for the limited purpose of conducting discovery solely to the issue of whether Mr. Lehtinen was acting within the course and scope of his employment at the time he made the statements at issue.

In light of defendant's Motion For Summary Judgment and the arguments contained therein, the court has reconsidered its February 20, 1989 Order and finds that the Attorney General's certification of scope of employment is not subject to judicial review and is conclusive and binding upon this Court.

Discussion

[1] In 1988, Congress amended the FTCA to grant federal employees broad

immunity from state law suits based on common law tort claims. The amendment provides that:

> The remedy against the United States provided by section 1346(b) and 2672 of this title for injury or loss of property or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's state is precluded without regard to when the act or omission occurred.

28 U.S.C. § 2679(b)(1). Congress has provided a specific mechanism for determining when federal employees are acting within the scope of their employment, and are thus personally immune from suit. Section 2679(d)(2) provides in pertinent part that:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. The certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

Id. The wording of the statute is mandatory in that it requires the United States to be substituted as a defendant upon the Attorney General's certification. The statute does not provide for judicial review of the Attorney General's grant of a "scope" certification. In fact, the intent of Congress

to preclude review of the granting of a scope certification is evident from the statutory provisions for review of a denial of a scope certification. Congress provided a narrow and specific mechanism for judicial review of a scope certification but only when the federal employee who is the target of the suit and who has been denied the scope certification requests judicial review. 28 U.S.C. § 2679(d)(3). In cases where the Attorney General grants the certification, the certification shall result in substitution of the United States as the defendant and shall be conclusive for purposes of removal.

Not only does the amended FTCA not provide for judicial review of scope certification, but the statute affirmatively precludes such review by denying the courts subject matter jurisdiction

to decide the issue. 28 U.S.C. § 2679 specifically mandates that, upon certification:

> any action or proceeding subject to paragraph (1) [actions filed in federal court where Attorney General has authority to certify scope], (2) [actions removed from state court where Attorney General has authority to certify scope], or (3) [actions where the district court has authority to certify scope after Attorney General's denial] shall proceed in the same manner as any action against the United States files pursuant to 28 U.S.C. § 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

Congress has placed exact limits on the federal court's ability to entertain common law tort claims against federal employees. When the Attorney General certifies that the employee was acting within the scope of his federal employment at the time of the alleged tort, the FTCA and 28 U.S.C. § 1346 are the sole basis of federal jurisdiction. The

district court must treat the case as a case against the United States.

In sum, no reasonable interpretation of the amended FTCA gives the courts power to review scope certifications. This Court must confine itself to the jurisdiction conferred by Congress and here, the jurisdictional inquiry must end with whether the Attorney General has certified scope, not with the merits of the certification. If certification is granted, the court has jurisdiction and the case must proceed against the United States as defendant pursuant to 28 U.S.C. § 1346(b) and the FTCA.

[2] Once the United States becomes the defendant, the sole remedy is the waiver of sovereign immunity created by the FTCA, with all of the FTCA's limitations and exceptions: the lack of

entitlement to a jury trial, the lack of punitive damages and, most important for the case sub judice, the exemptions from liability for claims arising out of certain intentional torts, including libel and slander, 28 U.S.C. § 2680(h). In the present case, plaintiff's claims arise out of the intentional torts of libel and slander and pursuant to 28 U.S.C. § 2680(h), the court has no subject matter jurisdiction over those claims.

Plaintiff, in its opposition to defendant's Motion For Summary Judgment, argues that the amendments to the FTCA are unconstitutional because the amendments violate plaintiff's right to procedural and substantive due process. Plaintiff essentially argues that: the amendment to the FTCA makes the FTCA

plaintiff's sole remedy, deprives plaintiff of a jury trial in state court, prohibits plaintiff from reviewing the scope of employment issue and provides the United States with dispositive defenses. In short, application of the FTCA will result in dismissal of plaintiff's claims.

[3] In order for plaintiff to show that the FTCA amendments violate due process, plaintiff must show that the challenged legislation is wholly arbitrary and irrational in purpose and effect. See Pension Benefit Guaranty Corp. v. R.A. Fray & Co., 467 U.S. 717, 728-34, 104 S.Ct. 2709, 2717-20, 81 L.Ed.2d 601 (1984); Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 98 S.Ct., 2660, 57 L.Ed.2d 595 (1978); Vance v. Bradley, 440 U.S. 93, 97-98, 99 S.Ct. 939, 942-943, 59 L.Ed.2d

171 (1979); Consolidated U.S. Atmospheric Testing Litigation, 820 F.2d 982 (9th Cir. 1987), cert. denied, ____ U.S. _____, 108 S.Ct. 1076, 99 L.Ed.2d 235 (1988). First, it is clear that "the Constitution does not forbid the creation of new rights or the abolition of old ones recognized by the common law to obtain a permissible legislative object." Silver v. Silver, 280 U.S. 117, 122, 50 S.Ct. 57, 58, 74 L.Ed. 221 (1929). This is true even though "otherwise settled expectations" may be changed by such legislative action. Duke Power Co., 438 U.S. at 88 n. 32, 98 S.Ct. at 2638 n. 32.

[4] In the present case, the primary purpose of the challenged legislation, the FTCA, is to protect federal employees from litigation and liability. Congress approved the challenged

amendments because it believed that exposing individual federal employees to liability "could lead to a substantial dimunition in vigor of Federal law enforcement and implementation." House Report at 3, U.S. Code Cong. & Admin. News 1988, pp. 5945, 5947. In enacting the amendments, Congress expressly took note of the fact that the United States would retain all of its defenses which would, in certain cases, leave some plaintiffs without a remedy.

> Therefore, suits against Federal employees are precluded even where the United States has a defense which prevents an actual recovery. Thus, any claim against the government that is precluded by the exceptions set forth in Section 2680 of Title 28 U.S.C. also is precluded against an employee [and] his or her estate.

House report at 6, U.S. Code Cong. & Admin. News 1988, p. 5950. Congress specifically struck the balance in favor

of the individual federal employee when there is competition between the employee's protection and the plaintiff's remedy. This court finds that Congress' conscious substitution of the United States as the sole defendant in pending tort actions is reasonably related to the goal of enhancing the vigor of Federal law enforcement and thus the FTCA amendments comport with the requirements of substantive due process. See also Consolidated Testing, 820 F.2d at 988-92 (Nuclear Energy Authorization Act of 1985, § 1631(b), 42 U.S.C. § 2212, an "exclusive remedy" statute, requiring substitution of the United States as sole defendant did not violate due process even though the United States had dispositive defenses which were unavailable to individual defendants); Thomason v. Sanchez, 539

F.2d 955, 959 (3d Cir. 1976) cert. denied, 429 U.S. 1072, 97 S.Ct. 809, 50 L.Ed.2d 790 (1977) (Federal Drivers Act, 28 U.S.C. §§ 2679 et seq., as applied to deprive motorcyclist service man of all lawsuit remedies for injuries received in a collision with a car driven by another serviceman, did not violate due process).

Accordingly, for the reasons stated above, it is

ORDERED AND ADJUDGED as follows:

1. The Petition For Removal is GRANTED.

2. The Motion To Substitute the United States as Defendant is hereby GRANTED.

3. All claims against Dexter W. Lehtinen are dismissed for lack of subject matter jurisdiction.

4. All claims against the United States are dismissed for lack of subject matter jurisdiction.

DONE AND ORDERED.

App. 20

S.J. & W. RANCH, INC.,
Plaintiff-Appellant,

v.

Dexter LEHTINEN and United States of America, Defendants-Appellees.

No. 89-5990.

United States Court of Appeals, Eleventh Circuit.

Oct. 10, 1990

Action was brought in state court against United States Attorney alleging libel, slander and invasion of privacy. Following removal, the United States District Court for the Southern District of Florida, No. 88-014213-CIV-JAG, Jose A. Gonzalez, Jr., J., 717 F.Supp. 824, dismissed complaint. On appeal, the Court of Appeals, Kravitch, Circuit Judge, held that United States Attorney General's certification that United States Attorney was acting within course

and scope of his employment at time he made allegedly defamatory statements was subject to judicial review under Federal Tort Claims Act.

Reversed and remanded.

1. **United States - 50.5(3)**

United States Attorney General's certification that United States Attorney was acting within course and scope of his employment at time he made allegedly defamatory statements was subject to judicial review under Federal Tort Claims Act; Attorney General's scope of certification was pertinent and dispositive only for removal purposes. 28 U.S.C.A. §§ 2671 et seq., 2679(d).

2. **United States - 50.5(3)**

Whether employee's actions are within scope of his employment for purposes of Federal Employees Liability Reform and Tort Compensation Act is

issue governed by law of state where incident occurred. 28 U.S.C.A. § 2679(d).

3. United States - 50.5(3)

Once in federal court, plaintiff is entitled to litigate question of whether federal employee was acting within scope of his employment when challenged conduct occurred. 28 U.S.C.A. § 2679(d).

4. United States - 50.5(3)

Although plaintiff bears burden of establishing that federal employee's challenged conduct exceeded scope of employment, district court's adjudication of matter is de novo. 28 U.S.C.A. § 2679(d).

J. David Pobjecky, Winter Haven, Fla., Phillip E. Kuhn, Lakeland, Fla., for plaintiff-appellant.

Alan Dagen, Asst. U.S. Atty., Ft. Lauderdale, Fla., Barbara Herwig, John F. Daly, Appellate Staff, Civil Div., Washington, D.C., for the U.S.

Anthony J. O'Donnell, Jr., Miami, Fla., for Lehtinen.

Appeal from the United States District Court for the Southern District of Florida.

Before KRAVITCH and COX, Circuit Judges, and DYER, Senior Circuit Judge.

KRAVITCH, Circuit Judge:

Plaintiff, S.J. & W. Ranch ("Ranch") appeals the dismissal of its complaint for libel and slander against Dexter Lehtinen, the United States Attorney for the Southern District of Florida. The dismissal was prompted by the substitution of the United States for Lehtinen as the defendant in the case pursuant to the Federal Employees

Liability Reform and Tort Compensation Act (the "Reform Act"), 28 U.S.C. § 2679 (1988), after the Attorney General determined that Lehtinen's statements were made within the scope of his duties as United States Attorney. The substitution of the United States as the defending party deprived the court of jurisdiction to entertain the Ranch's suit because the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2680(h), precludes libel and slander claims against the United States. Because the district court erroneously held that the Attorney General's certification decision for purposes of substitution is not subject to judicial review, we reverse and remand for an evidentiary hearing on whether Lehtinen's statements were made within the scope of his employment.

BACKGROUND

Plaintiff's complaint alleges that on September 15, 1988, Dexter Lehtinen held a press conference during which he announced that the United States Attorney's Office for the Southern District of Florida had initiated civil forfeiture actions against the Ranch and two other properties. In the course of his accountant, Lehtinen allegedly made several defamatory statements concerning the involvement of the Ranch property and its owners in narcotics trafficking. On November 21, 1988, the Ranch filed a defamation suit against Lehtinen in the Circuit Court for Okeechobee County, Florida.

On December 8, 1988, pursuant to the Reform Act, a designate of the Attorney General of the United States certified that Lehtinen was acting

within the scope of his employment as United States Attorney at the time of the press conference. See 28 U.S.C. § 2679(d). On the basis of this certification, the action was removed to the United States District Court for the Southern District of Florida and the United States was substituted for Lehtinen as the defendant. See 28 U.S.C. § 2679(d)(2). The district court held that judicial review of the Attorney General's scope of employment certification was foreclosed by the Reform Act. 717 F.Supp. 824. Therefore, once the United States was substituted as the defendant pursuant to the Reform Act, provisions of the FTCA deprived the court of subject matter jurisdiction to hear plaintiff's defamation claims.

On appeal both the plaintiff and the United States contend that the district court erred in holding that the Reform Act precludes judicial review of the scope of employment certification with respect to the substitution of defendants.[1/] Lehtinen persists in

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1/ The United States, which took the opposite view before the district court, explains the shift of its position as follows:

> The district court held, as a matter of law, that the Attorney General's scope certification under the Act is conclusive, and not subject to judicial review. Although the United States itself urged that position in the court below, we have subsequently determined, on the basis of further study of the Act's legislative history, that such an interpretation of the Act is in error. . . . [T]he statute itself is ambiguous regarding the availability of judicial review of scope determinations, and there are plausible arguments favoring the interpretation adopted by the district court. In our view, however, the balance is tipped by legis-

(Footnote continued on next page.)

defending the district court's construction of the statute.[2/] The Ranch

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(Footnote continued from previous page.)
lative history that unmistakably indicates that the Act's congressional sponsors envisioned the availability of judicial review of this issue. Accordingly, we cannot support the legal theory on which the district court based its ruling.

Brief for Appellee at 12-13. The government further added that "[t]his change [was] made after extensive review by Department of Justice officials." Id. at 18-19; see Petrousky v. United States, 728 F.Supp. 890, 891 (N.D.N.Y. 1990) (discussing same change in government position on certification); Baggio v. Lombardi, 726 F.Supp. 922, 924 & n. 1 (E.D.N.Y. 1989) (same).

2/ In a motion carried with the case, Lehtinen seeks to strike that portion of the government's brief espousing its new position with respect to the appropriate interpretation of the Reform Act. Lehtinen argues that the government is precluded from pursuing a "modification" of the district court's judgment because it failed to file a cross-appeal. This motion borders on the frivolous. The government is not seeking to modify the relief it received below,
(Footnote continued on next page.)

argues in the alternative that if the Reform Act prohibits judicial review of the certification decision, it violates plaintiff's rights of due process and

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(Footnote continued from previous page.) rather it is defending the district court's judgment on different, and in its view, more tenable grounds. See City of Safety Harbor v. Birchfield, 529 F.2d 1251, 1254 n.4 (5th Cir. 1976).* The government's salutary admission of error, far from warranting condemnation, should be emulated by all litigants who discover that a position they have advocated lacks merit. Lehtinen's motion to strike is denied in its entirety. His motion to adopt argument II of the brief of the United States is granted.

*The Eleventh Circuit, in the en banc decision Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

equal protection. We need not address these constitutional concerns because we agree with the Ranch and the United States that the district court erred in its construction of the statute.

DISCUSSION

The Reform Act was passed in response to the Supreme Court's decision in Westfall v. Erwin, 484 U.S. 292, 108 S.Ct. 580, 98 L.Ed.2d 619 (1988), which reduced the immunity previously available to federal employees for common law torts committed within the scope of their employment. Nasuti v. Scannell, 906 F.2d 802 (1st Cir. 1990); Arbour v. Jenkins, 903 F.2d 416, 420 (6th Cir. 1990); Springer v. Bryant, 807 F.2d 1085, 1086-87 (11th Cir. 199); Sowell v. American Cyanamid Co., 888 F.2d 802, 805 (11th Cir. 1989). Congress described

the purpose of the Act as being to protect federal employees from personal liability for common law torts committed within the scope of their employment, while also providing persons injured by the common law torts of federal employees with an appropriate remedy against the United States. Pub.L. No. 100-694 § 2(b); Nasuti, 906 F.2d at 804; Gogek v. Brown Univ., 729 F.Supp. 926, 930 (D.R.I. 1990). The crux of the issue before us on appeal is whether the Attorney General's Office or the federal district court is the forum entrusted with determining whether the challenged conduct occurred within the scope of employment for purposes of substituting the United States as the defendant.[3/]

3/ This question was expressly left open by the Eleventh Circuit in Springer, 897 F.2d at 1087 n. 3.

[1] The section of the Reform Act that is the basis of the parties' dispute provides that:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed . . . to the [appropriate] district court of the United States. . . . Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. The certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

28 U.S.C. § 2679(d)(2). It is significant that the statute, on its face, does not explicitly preclude judicial review of scope certification with respect to the substitution of the United States. to the contrary, the statute's express provision that certification "shall

conclusively establish scope of office or employment for purposes of removal," suggests that congress intended to make scope certification unreviewable only with respect to removal. See Nasuti, 906 F.2d at 809; Gogek, 729 F.Supp. at 933; Martin v. Merriday, 706 F.Supp. 42, 45 (N.D. Ga. 1989). This interpretation is consistent with a congressional intent to ensure that federal rather than state courts review the Attorney General's scope certification. Martin, 706 F.Supp. at 45; see Nasuti, 906 F.2d at 813 & n. 16; Gogek, 729 F.Supp. at 933. Additionally, a provision in another section of the Reform Act allowing federal employees to seek judicial review of denials of certification indicates that the Act contemplated federal review of the Attorney General's certifications. See Martin, 706 F.Supp.

at 45; 28 U.S.C. & 2679(d)(3). Although the plain language of the statute militates in favor of the interpretation advanced by the Ranch and the United States, the section is sufficiently ambiguous[4/] that a consideration of the statute's legislative history is helpful. See Arbour, 903 F.2d at 421.

Our review of this history persuades us that the district court's interpretation was in error. During the hearings before the House Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, Subcommittee Chair Frank, a

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4/ Gogek, 729 F.Supp. at 933. Cf. Aviles v. Lutz, 887 F.2d 1046, 1049 (10th Cir. 1989) (construing statutory language to preclude judicial review of certification); Mitchell v. Carlson, 896 F.2d 128, 136 (5th Cir. 1990) (suggesting that statute precludes judicial review of certification).

sponsor of the bill, expressed his understanding that under section 2679(d)(2) a "plaintiff can still contest the certification. . . ." Legislation to Amend the Federal Tort Claims Act: Hearing on H.R. 4358, H.R. 3872, and H.R. 8083 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 100th Cong., 2d Sess. 128 (1988) [hereinafter Hearings]; see Arbour, 903 F.2d at 421. Representative Frank elaborated:

> I mean that [this bill] is not going to void the [certification] litigation. It seems to me the certification is a weapon against the employee, not against the plaintiff, because the plaintiff would still have the right to contest the certification if they thought the Attorney General were certifying without justification.

Hearings, supra, at 128 (emphasis added). This understanding of the bill

was reiterated in a colloquy with Lois Williams, Director of Litigation at the National Treasury Employees Union.

> Frank: [E]ssentially the judge is deciding the case. One of the issues for the judge is going to be to decide [certification] . . . because you might have a third route. It is conceivable -- I cannot think of too many cases -- where the plaintiff might not want the Government in there.
>
> Williams: that is right.
>
> Frank: So the plaintiff might object to the argument and the Government might certify. But that would not be binding on the plaintiff. The plaintiff would, I assume, have the right to go into court and say, baloney, it was not within the scope of employment, either because of some immunity issue or because you really hated that defendant and you wanted to get them.
>
> Williams: Yes. In fact, that is the way it frequently has arisen in the past.

Id. at 197. Representative Frank's understanding that the certification issue would be subject to judicial

review was shared not only by Williams, but also by a representative of the Justice Department, Deputy Assistant Attorney General Robert Willmore, as is evidenced by the following exchange:

> Frank: Well, but he plaintiff can still contest the certification, could he not?
>
> Willmore: Yes.

Id. at 128; see Arbour, 903 F.2d at 421. Later during the hearing, Willmore reiterated: "Chairman Frank is correct that a plaintiff can challenge that certification. So that would be reviewable by a court at some point, probably by a Federal District Court." Hearings, supra, at 133; Arbour, 903 F.2d at 421. We agree. The legislative history of the certification provision of the Reform Act coupled with the language of the statute itself persuades us that the Attorney General's scope certification

is pertinent and dispositive only for removal purposes.

Our interpretation of the statute is supported by several additional considerations. First, separation of powers concerns generally bar executive branch interference in the judicial branch's determination of its subject matter jurisdiction. See Nasuti, 906 F.2d at 813 (potential separation of powers problem if statute read "to leave the Attorney General as the sole judge of an issue determinative of the jurisdiction of the federal court"); Gogek, 729 F.Supp. at 933 (potential separation of powers problem if statute read to "vest the United States Attorney with absolute discretion to perform what is either a legislative or a judicial function"). The substitution of the United States for the federal employee

in this, and other similar cases, will have the direct and immediate effect of depriving the federal court of subject matter jurisdiction over the action because the FTCA does not waive sovereign immunity for such employee conduct occurring within the scope of employment. Gogek, 729 F.Supp. at 933. As the First Circuit cogently noted, "it is hard to imagine Congress empowering an executive officer, the Attorney General of the United States, to displace the federal court as the final determiner of the scope of employment question, thus forcing a federal court to forego determination of its own jurisdiction, and preventing the plaintiff, by executive fiat, from pursuing a possibly legitimate claim in state court." Nasuti, 906 F.2d at 812; see Gogek, 729 F.Supp. at 933.

Moreover, the statutory interpretation urged by defendant Lehtinen is particularly suspect because it leaves the determination of a dispositive issue in FTCA cases to an interested party. Under 28 U.S.C. § 2679(c), the Attorney General is required to "defend any civil action or proceeding brought in any court against any employee of the Government . . . for any such damage or injury." Id. We do not believe Congress intended to entrust the party responsible for providing the federal employee's defense with the power to make a scope determination that will have the result of dismissing the plaintiff's suit for lack of jurisdiction. Nasuti, 906 F.2d at 812-13; Petrousky, 728 F.Supp. at 894; see Gogek; 729 F.Supp. at 933. Our concern with the impartiality of the scope determination

is especially acute in a situation like the one in this case where the authority to make scope certifications has been delegated to the federal employee defendant or his colleagues.[5/]

We are also cognizant of the due process implications inherent in treating the Attorney General's scope certification as dispositive. We share the First Circuit's observation that nothing in the regulations governing

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5/ As a United States Attorney, Lehtinen was authorized to make scope certifications. See 28 C.F.R. § 15.3(a) (1989); Nasuti, 906 F.2d at 804 n. 1; Arbour, 903 F.2d at 421. In this case, another Justice Department official, Torts Branch Director, John Farley III, provided the scope certification. See 28 C.F.R. § 15.3(b)4 (authorizing Assistant Attorney General to redelegate certification authority to subordinate division officials). Cf. Martin, 706 F.Supp. at 44 n. 1 (noting that the Assistant Attorney General has delegated certification authority to any Director of the Torts Branch).

scope certifications requires the Attorney General "to conduct a neutral proceeding, open to all parties, before taking a final position on the scope question -- the least one might have expected had Congress intended the Attorney General to substitute for the federal courts as the final arbiter of a controversy affecting both the parties' rights and liabilities and the court's jurisdiction." Nasuti, 906 F.2d at 812-13. Defendant Lehtinen's construction of the statute raises due process concerns because such a statutory scheme would permit the Attorney General to arbitrarily deprive a plaintiff of a cause of action without a meaningful opportunity to be heard and other procedural safeguards. See Nasuti, 906 F.2d at 813; Gogek, 729 F.Supp. at 933; Petrousky, 728 F.Supp. at 892-95; see

also Martin, 706 F.Supp. at 44 (expressing concern over lack of standards by which Attorney General is to make scope certification).

[2] Finally, whether an employee's actions are within the scope of his employment for purposes of the Reform Act is an issue governed by the law of the state where the incident occurred. Nasuti, 906 F.2d at 805 n. 3; Arbour, 903 F.2d at 421-22; 28 U.S.C. § 1346(b); see Williams v. United States, 350 U.S. 857, 76 S.Ct. 100, 100 L.Ed. 761 (1955). Because this determination involves a question of law as well as fact, it is reasonable to assume that Congress entrusted the authoritative disposition of this question to the judicial rather than the executive branch. See Petrousky, 728 F.Supp. at 892 (legislative history of the Reform

Act reveals Congressional approval of scope determinations made by courts).

[3] Based upon our construction of the Reform Act and the above considerations, we conclude that once in federal court a plaintiff is entitled to litigate the question of whether the employee was citing within the scope of his employment when the challenged conduct occurred. Accord Nasuti, 906 F.2d at 813; Arbour, 903 F.2d at 421; Gogek, 729 F.Supp. at 933; Petrousky, 728 F.Supp. at 891; Baggio, 726 F.Supp. at 925; Martin, 706 F.Supp. at 45; see also Sowell, 888 F.2d at 804-05 (reviewing and upholding scope determination in light of trial testimony); Robinson v. Egnor, 699 F.Supp. 1207, 1215 & n. 14 (E.D.Va. 1988) (conducting scope determination).

A remaining question is the degree of deference, if any, the district court should accord the Attorney General's scope certification for purposes of determining the propriety of substituting the United States for the employee as the defendant in the lawsuit. The Justice Department, relying on the mandatory language of the statute, argues that the Attorney General's certification shifts the burden on the plaintiff to establish that the defendant acted outside the scope of his employment. Additionally, the government urges that the Attorney General's determination is entitled to "substantial deference" from the federal courts. Brief of Appellee at 22. In support of this proposition, the government makes the conclusory argument that "underlying that ultimate issue [of scope] are determinations on

matters that are uniquely within the purview of the Executive Branch - i.e., defining the activities that are within the employer's business and ascertaining the range of responsibilities entrusted to the individual employee." Id. Although we are persuaded by the statutory language that the plaintiff has the burden of proving that the employee's conduct was not encompassed by the scope of his employment, we agree with the majority of federal courts that the district court determines scope de novo.

The government's contention that the plaintiff bears the burden of proving that the employee acted outside the scope of his employment is well supported by the mandatory nature of the Reform Act's terms. The statute provides that "[u]pon certification . . . the United States shall be substituted

as the party defendant." 28 U.S.C. § 2679(d)(2). Although, as discussed above, this scope certification is not dispositive for purposes of substitution, it indicates that the United States is substituted as an automatic consequence of the Attorney General's certification. Unless the plaintiff challenges the scope determination, the court is entitled to treat the Attorney General's certification as prima facie evidence that the employee conduct at issue occurred within the scope of the employment. The burden of altering the status quo by proving that the employee acted outside the scope of employment, therefore, on the plaintiff.

[4] Although the plaintiff bears the burden of establishing that the challenged conduct exceeded the scope of

employment, the district court's adjudication of the matter is de novo. See Nasuti, 906 F.2d at 808 (district court must make "express determination of its own that defendant, when he allegedly injured plaintiff, was acting beyond the scope of his federal employment"); Petrousky, 728 F.Supp. at 895 (district court review of certification is de novo); see also Sowell, 888 F.2d at 804-05 (upholding trial court and Justice Department determinations that defendant acted within scope of employment because they were "obviously correct in light of the testimony at trial").

This conclusion is dictated largely by the same reasoning that persuaded us that the Attorney General's scope certification is only relevant for removal purposes. As we noted above, the

removal and substitution determinations are distinct and independent under our interpretation of the statute. It would, therefore, be anomalous to restrict the court's adjudication of the substitution issue by requiring deference to a determination made in the entirely separate removing context. The Reform Act's policy of ensuring federal review of suits involving federal employees is not at all furthered by requiring a federal court to defer to the Attorney General's scope certification in determining the substitution issue. The conclusion that the Attorney General's scope certification does not warrant judicial deference is further supported by the fact that the Attorney General does not possess a particular expertise in determining whether a federal employee's actions occurred in

the scope of his employment within the meaning of the appropriate state law. Finally, our concern with the highly discretionary and potentially biased nature of the Attorney General's certification determination reinforces our view that such a scope certification should not be entitled to deference in the substitution context.

CONCLUSION

The district court erred in finding the Attorney General's scope certification non-reviewable for purposes of substitution. On remand the district court should conduct a de novo hearing on whether defendant Lehtinen's conduct

occurred within the scope of his employment and permit the plaintiff full discovery[6/] on the scope question. If the district court agrees with the Attorney General's determination following its independent review of the issue, then the United States should be substituted for defendant Lehtinen and the action dismissed. Nasuti, 906 F.2d at 814; Baggio, 726 F.Supp. at 925. Should the district court reach a contrary conclusion, it must remand the case back to the state court for trial. Nasuti, 906 F.2d at 814 & n. 17; Baggio, 726 F.Supp. at 925; see Petrousky, 728 F.Supp. at 899.

6/ See Arbour, 903 F.2d at 421 (reversing district court's denial of plaintiff's discovery requests on scope of employment issue).

REVERSED and REMANDED.

S.J. & W. RANCH, INC.,
Plaintiff-Appellant,

v.

Dexter LEHTINEN, United States of America,
Defendants-Appellees.

No. 89-5990.

United State Court of Appeals,
Eleventh Circuit.

Feb. 8, 1991.

J. David Pobjecky, Winter Haven, Fla. and Phillip E. Kuhn, Lakeland, Fla., for plaintiff-appellant.

Dexter Lehtinen, U.S. Atty. Guy W. Harrison, Asst. U.S. Atty., Miami, Fla., Alan Dagen, Asst. U.S. Atty., Ft. Lauderdale, Fla., Barbara Herwig, and John F. Daly, Appellate Staff, Civ. Div., Washington, D.C., for the U.S.

Anthony J. O'Donnell, Jr., Miami, Fla., for Lehtinen.

Appeal from the United States District Court for the Southern District of Florida; Jose A. Gonzalez, Judge.

Before KRAVITCH and COX, Circuit Judges, and DYER, Senior Circuit Judge.

PER CURIAM:

The opinion in the above case dated October 10, 1990, and reported at 913 F.2d 1538, is amended by deleting the final sentence of the CONCLUSION and the accompanying citations.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-5990

S. J. & W. RANCH, INC.,
Plaintiff-Appellant,

versus
DEXTER LEHTINEN,
UNITED STATES OF AMERICA,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION(S) FOR REHEARING
(February 8, 1991)

BEFORE: KRAVITCH and COX, Circuit Judges, and DYER, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellee, United States of America, is denied.

ENTERED FOR THE COURT:

PHYLLIS KRAVITCH
United States Circuit Judge

App. 57

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-5990

S. J. & W. RANCH, INC.,

Plaintiff-Appellant,

versus

DEXTER LEHTINEN,
UNITED STATES OF AMERICA,

Defendants-Appellees.

On Appeal from the United States
District Court for the Southern
District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion October 10, 1990, 11th Cir.,

199__,___ F.2d ___).

(February 8, 1991)

Before: KRAVITCH and COX, Circuit Judges, and DYER, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing of Dexter Lehtinen is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5, the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

PHYLLIS KRAVITCH
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-5990

S.J. & W. RANCH, INC.,
Plaintiff-Appellant,

versus

DEXTER LEHTINEN and
UNITED STATES OF AMERICA

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

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O R D E R:

( ) The motion of Appellee, Dexter Lehtinen, for (XX) stay ( ) recall and stay issuance of the mandate pending petition for writ of certiorari is DENIED.

(XX) The motion of Appellee, Dexter Lehtinen, for (XX) stay ( ) recall and stay of the mandate pending petition for writ of certiorari is GRANTED to and

including May 8, 1991, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period mentioned above there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

PHYLLIS A. KRAVITCH
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
JUN 4 1991
OFFICE OF THE CLERK

(2)

No. 90-1789

In The

Supreme Court of the United States

October Term, 1990

DEXTER LEHTINEN,

Petitioner,

v.

S. J. and W. RANCH, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether the recently amended Federal Tort Claims Act, 28 U.S.C. §2679(d), grants the federal district court's jurisdiction to overrule a certification by the United States Attorney General that a federal employee was acting within the scope of employment and, thereafter, to adjudicate purely state law tort claims against that employee.

(2) Whether an appellee on appeal may seek to modify the rationale and relief granted to a co-appellee by a district court order without filing a cross appeal challenging that order.

No. 90-1789

In The

Supreme Court of the United States

October Term, 1990

DEXTER LEHTINEN,

Petitioner,

v.

S. J. and W. RANCH, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, S.J. and W. RANCH, INC., respectfully prays that the Court deny the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

STATEMENT

Petitioner, Dexter Lehtinen, wants this Court to rule that a determination of a dispositive issue in a Federal Tort Claims Act be left to an interested party.

Furthermore, Mr. Lehtinen asserts that the dispositive issue[1] should be entrusted to the party that is not only responsible for providing the Federal employee's defense but also to make a non-biased scope of employment determination with a potential result of dismissing the Plaintiff's suit for lack of jurisdiction.[2]

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[1] Respondent brought an action in state court against the United States Attorney alleging libel, slander and evasion of privacy. The Petitioner caused the case to be removed to the United States District Court for the Southern District of Florida, and have the United States substituted as the defendant, No. 88-014213-CIV-JAG, Jose A. Gonzalez, Jr., J., 717 Federal Supplement 824, dismissed complaint. The trial judge dismissed the complaint due to the fact that Mr. Lehtinen was certified by the Attorney General's office as acting within the scope of his employment and, therefore, this case would be properly dismissed under the Federal Tort Claims Act since the cause of action could not be maintained against the United States under the Federal Tort Claims Act.

[2] Upon removal, the United States Government was substituted as the defendant instead of Dexter Lehtinen, United States Attorney for the Southern District of Florida. The designate of the Attorney General of the United States was another Justice Department official, Torts Branch Director, John Farley, III, who provided the scope of employment and certification to the Federal District Court.

The United States Court of Appeals, Eleventh Circuit, reversed and remanded the case to the district court and mandated it to conduct a *de novo* hearing on whether Defendant Lehtinen's conduct occurred within the scope of his employment. *See* 28 U.S.C.A. §2679(d)(2).

SUMMARY OF ARGUMENT

The Eleventh Circuit was cognizant of the due process implications inherent in treating the Attorney General's scope certification as absolute and dispositive of a primary issue of law and fact. Petitioner Lehtinen's construction of the statute would raise serious due process concerns since his interpretation would permit the Attorney General, Petitioner Lehtinen's boss, to be the final arbitrator of a controversy not only affecting the parties' rights but also the court's jurisdiction.[3]

In the event this Court does not adopt the Eleventh Circuit's construction of the statute, then in the alternative, the Respondent would argue that the Reform Act prohibition of the judicial view of the certification decision is a violation of the Plaintiff's rights of due process and equal protection as asserted in the alternative before the Eleventh Circuit.

There is no apparent conflict of the decision above with other cases such as might justify granting certiorari. The other cases seem to reach a decision similar or if not exactly as the Eleventh Circuit did in the case at hand. Finally, there is no special or important Federal interest in ruling on this matter since the other courts are permitting Federal court review of the Attorney General's certification. This petition for writ of certiorari should be denied.

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[3] See *Nasuti v. Scannell*, 906 Fed. 2d 802 (1st Circuit) 1990; *Springer v. Bryant*, 897 Fed. 2d 1085 (11th Circuit) 1990); *Sowell v. American Cyanamid Co.*, 888 Fed. 2d 802 (11th Circuit) 1989.

REASONS FOR DENYING WRIT

I.

The Decision Below Correctly Interprets the Statute by the Utilization of Legislative History.

In the Eleventh Circuit opinion reversing and remanding this case, the Court of Appeals carefully analyzed the legislative history which was consistent with its ruling. See *Arbour v. Jenkins*, 903 Fed. 2d, 416 (6th Circuit) 1990.

II.

This Case Does Not Have Broad National Significance.

The Eleventh Circuit has permitted Petitioner Lehtinen to exhaust its constitutional theories and statutory construction theories not only on his initial brief but also on a motion for rehearing. Petitioner Lehtinen's own employer, the United States Government, has joined Respondent at the Eleventh Circuit in arguing against Petitioner Lehtinen. The petition does not show that the Court of Appeals was incorrect and, more importantly, does not show a significance which would justify review by this Court.

CONCLUSION

For the foregoing reasons, the writ of certiorari to the United States Supreme Court should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUL 24 1991
OFFICE OF THE CLERK

(3)

No. 90-1789

In the Supreme Court of the United States

OCTOBER TERM, 1991

DEXTER LEHTINEN, PETITIONER

v.

S.J. and W. RANCH, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in a tort action against an individual federal employee subject to the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. 2679, a certification by the Attorney General that the employee was acting within the scope of his federal employment is subject to review by a federal district court.

2. Whether the court of appeals erred in permitting the United States to file a brief as an appellee, when the United States argued for affirmance of the district court's judgment but challenged the district court's reasoning.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1789

DEXTER LEHTINEN, PETITIONER

v.

S.J. and W. RANCH, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20-52) is reported at 913 F.2d 1538. An order modifying the court of appeals' opinion (Pet. App. 53-54) is reported at 924 F.2d 1555. The opinion of the district court (Pet. App. 1-19) is reported at 717 F. Supp. 824.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 1990. Orders of the court of appeals amending its earlier opinion and denying petitions for rehearing were entered on February 8, 1991 (Pet. App. 55-58). The petition for a writ of certiorari was filed on May 7, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is the United States Attorney for the Southern District of Florida. In 1988, respondent S.J. & W. Ranch, Inc. (SJ&W) commenced an action against petitioner in the Circuit Court for Okeechobee County, Florida. The complaint asserts claims of libel and slander arising out of petitioner's statements during a press conference at which he announced the institution of a civil forfeiture action involving real property owned by SJ&W. See Pet. App. 5.

In accordance with the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563-4567, codified at 28 U.S.C. 2679 (the Reform Act), the Attorney General's designate certified that petitioner was acting within the scope of his office at the time of the incident out of which SJ&W's claims arose. See 28 U.S.C. 2679(d)(2).[1] Petitioner, represented by the Department of Justice, removed the action to federal court and moved to substitute the United States as the defendant. The United States also moved for summary judgment, arguing that, upon substitution, the action would be barred by 28 U.S.C. 2680(h). That provision prohibits suit against the United States under the Federal Tort Claims Act on claims "arising out of * * * libel [or] slander." 28 U.S.C. 2680(h); see generally *United States* v. *Smith*, 111 S. Ct. 1180 (1991).[2]

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[1] The certification was issued by John J. Farley, III, Director of the Torts Branch, Civil Division. The Attorney General had delegated his authority to issue scope certifications to Mr. Farley, among others. See 28 C.F.R. 15.3.

[2] In *United States* v. *Smith*, *supra*, this Court held that the Reform Act applies – and requires substitution of the United States in place of federal employees sued on account of acts within the scope of their

SJ&W opposed substitution of the United States as defendant and moved for a remand to state court, arguing that petitioner had acted outside the scope of his office in making the statements at issue. Pet. App. 5-7.

The district court substituted the United States as the defendant and dismissed the action. Pet. App. 1-19. The court held, consistent with the position the Department had advanced on petitioner's behalf, that substitution was mandatory because the "certification of scope of employment is not subject to judicial review and is conclusive and binding upon [the district court]." *Id.* at 7a; see *id.* at 9a-12a. The court also concluded that since SJ&W's claims "arise

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employment—even if an exception to the FTCA bars the pursuit of the claim against the United States.

The Reform Act provides, with exceptions not relevant to this case, that "[t]he remedy against the United States provided by [the FTCA] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee." 28 U.S.C. 2679(b)(1). To enforce the exclusivity of the FTCA remedy, the Act provides for what have come to be known as "scope certifications." In actions commenced against federal employees in federal or state court, the Attorney General is empowered to certify that the employee was "acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. 2679(d)(1)-(2). If the Attorney General refuses to issue such a certification, the employee may seek one from the court. 28 U.S.C. 2679(d)(3). Upon certification, the action is "deemed an action against the United States"; "the United States is substituted as the party defendant"; and the action "proceed[s] in the same manner as any action against the United States" under the FTCA. 28 U.S.C. 2679(d)(1)-(4). As *Smith* and this case reflect, application of these provisions can result in dismissal of an action that might have been pursued against the individual employee; accordingly, some plaintiffs, such as SJ&W, have an interest in challenging a scope certification.

out of the intentional torts of libel and slander," it had "no subject matter jurisdiction over those claims." *Id.* at 13a (citing 28 U.S.C. 2680(h)). Finally, the court rejected the contention that the Reform Act violated SJ&W's constitutional rights to substantive and procedural due process. Pet. App. 13-18.

2. a. SJ&W noticed an appeal. While the appeal was pending, the Department of Justice reassessed its position on the issue whether the Reform Act permits judicial review of scope certifications. At the end of its review, the Department concluded that the Act should be construed to allow judicial review of scope determinations by the Attorney General and his designates. See Pet. App. 27-28 & n.1.

In the court of appeals, the Department of Justice represented the United States, and petitioner was represented by private counsel. Petitioner contended that the district court had been correct in its determination that the scope certification was conclusive. Appearing as an appellee, the United States also argued that the district court's judgment should be affirmed, but on grounds different from those advanced by petitioner. The government contended that, although the scope certification was subject to judicial review, the record before the district court was sufficient to sustain a finding that petitioner was acting within the scope of his employment. Petitioner moved to strike the portion of the government's brief that argued that scope certifications are subject to judicial review. His motion contended that the government, having failed to notice a cross-appeal, was precluded from arguing for a modification of the judgment. See Pet. App. 28-29 n.2.

b. The court of appeals denied the motion to strike, reversed the district court's judgment, and remanded for further proceedings. Pet. App. 20-52. The court found that the motion to strike "bor der[ed] on the frivolous" since the

government was "not seeking to modify the relief it received below," but rather was "defending the district court's judgment on different, and in its view, more tenable grounds." *Id.* at 28-29 n.2.

On the merits, the court of appeals concluded that the Reform Act does not foreclose judicial review of an administrative scope certification. Addressing first the language of the statute, the court explained that "the statute, on its face, does not explicitly preclude judicial review of [a] scope certification with respect to the substitution of the United States" and "the statute's express provision that certification 'shall conclusively establish scope of office or employment *for purposes of removal*,' suggests that Congress intended to make scope certification unreviewable only with respect to removal." Pet. App. 32-33. The court found further support for that interpretation in provisions of the Act that authorize removal of actions to federal court and permit a federal employee who is denied a scope certification by the Attorney General to seek one from a court. *Id.* at 33.

The legislative history, the court continued, also indicated "that the district court's interpretation was in error." Pet. App. 34. The court relied primarily on statements during committee hearings by Representative Frank, a sponsor of the legislation who chaired the subcommittee conducting the hearings, and by Deputy Assistant Attorney General Robert Willmore, the Department's representative at the hearings. Both expressed their understanding that an administrative scope certification would be subject to judicial review. *Id.* at 35a-37a (quoting *Legislation to Amend the Federal Tort Claims Act: Hearing on H.R. 4358, H.R. 3872, and H.R. 3083 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 128, 133, 197 (1988) [hereinafter *House Hearings*]).

The court found further support for its interpretation in several "additional considerations." Pet. App. 38-43. It also observed that because scope certifications involve issues of state law, "it is reasonable to assume that Congress entrusted the authoritative disposition of this question to the judicial rather than the executive branch." *Id.* at 43.

The court of appeals did not address the United States' contention that the record before the district court was sufficient to support a determination that petitioner acted within the scope of his office with respect to the matters at issue. Instead, it remanded for discovery and "a de novo hearing on whether [petitioner's] conduct occurred within the scope of his employment." Pet. App. 50-51.[3]

ARGUMENT

The court of appeals' determination that the Reform Act permits judicial review of a scope determination is well founded. There is no conflict among the courts of appeals that calls for this Court's attention. Further review is therefore not warranted.

1. a. The text of the Reform Act is susceptible to two readings with respect to the reviewability of administrative scope determinations. As the district court noted (Pet. App. 9-10), much of Section 2679(d) is phrased in mandatory terms. Section 2679(d)(2), which authorizes administrative scope determinations in actions commenced in state court, provides that upon the issuance of a scope certification, "any

[3] The court's original opinion stated that if the district court concluded that petitioner was acting outside the scope of his employment, "it must remand the case back to the state court for trial." Pet. App. 51. In a petition for rehearing, the United States argued that the Reform Act made the Attorney General's scope certification conclusive for purposes of removal and thus foreclosed a remand. The court of appeals issued an order deleting the reference to a remand from its opinion. *Id.* at 53-54.

civil action or proceeding commenced upon such claim in a State court shall be removed" to federal court; that "[s]uch action or proceeding shall be deemed to be an action or proceeding brought against the United States under" the FTCA; and that "the United States shall be substituted as the party defendant." Upon substitution, Section 2679(d)(4) continues, the action "shall proceed in the same manner as any action against the United States filed pursuant to [28 U.S.C. 1346(b)] and shall be subject to the limitations and exceptions applicable to those actions." Read in isolation, these provisions suggest that removal and substitution must irrevocably follow any scope determination by the Attorney General.[4]

On the other hand, the Act does not expressly prohibit a court that has complied with the Act's mandatory language by substituting the United States as the defendant from considering a motion to resubstitute based upon a showing that the employee was in fact acting outside the scope of his employment. That is, the statutory language does not state that an administrative scope certification is conclusive for purposes of substitution. To the contrary, the only provision that directly addresses the preclusive effect of a scope certification is subject to an express qualification. Section

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[4] The fact that the Act provides an employee who has been denied a scope certification with a means of seeking a certification from a court, but does not provide expressly for administrative review of the issuance of a scope certification provides additional support for that interpretation. See *Block* v. *Community Nutrition Institute*, 467 U.S. 340 (1984) (preclusion of judicial review "fairly discernible" from "statutory scheme" that grants right of review to specified parties, in specified circumstances). Furthermore, such a reading of the Reform Act would advance the Act's objective of freeing federal employees from the burdens and distractions of tort litigation. See Reform Act, § 2(a)(5) and (6), 102 Stat. 4563; H.R. Rep. No. 700, 100th Cong., 2d Sess. 2-3 (1988).

2679(d)(2) provides that scope certifications by the Attorney General "shall conclusively establish scope of office or employment *for purposes of removal*" (emphasis added). In the same vein, Section 2679(d)(1), the provision that addresses scope certifications in cases commenced in federal court (which, by their nature, result in substitution but not removal), includes no comparable language regarding the conclusiveness of that category of scope certifications.

Read together, these provisions suggest that Congress intended to make administrative scope certifications conclusive and unreviewable *only* for purposes of removal.[5]

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[5] Petitioner contends (Pet. 33-35) that the Reform Act cannot fairly be read to make a scope certification conclusive only for purposes of removal, since Section 2679(d)(4) provides that actions in which the Attorney General has issued a scope certification "shall proceed in the same manner as any action against the United States filed pursuant to [28 U.S.C. 1346(b)]." In his view, this provision makes Section 1346(b) the exclusive source of federal jurisdiction over actions in which scope certifications have been issued; since that Section applies only to actions against the United States, he reasons, resubstitution of the employee as a defendant would deprive the court of any continuing jurisdiction over the case.

We disagree. Section 2679(d)(2) is a fully sufficient grant of removal jurisdiction over cases, commenced in state court, in which the Attorney General has issued a scope certification. That Section provides that upon certification, a state court action "shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending." 28 U.S.C. 2679(d)(2). This grant of jurisdiction is sufficient to sustain the district court's authority to retain a case even if, on review of the administrative scope determination, the court concludes that the federal employee was acting outside the scope of his employment. Such a scheme is plainly constitutional. The Reform Act creates a federal immunity defense, and provides for the resolution of that defense in federal court. See also 28 U.S.C. 2679(d)(3) (authorizing removal in cases in which employees assert a right to a scope certification). The fact that a federal district

Such a scheme would represent a reasonable accommodation of the interests of the United States, federal employees, and plaintiffs in scope certifications. Making a certification conclusive for purposes of removal only would guarantee that issues regarding scope of employment would be subject to review in a federal court of appeals and would assure that claims involving conduct arguably within the scope of employment were resolved in a federal forum, while protecting plaintiffs against unwarranted dismissals of claims against employees.

That reading is buttressed by the "strong presumption that Congress intends judicial review of administrative action." *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). Moreover, because the language of the Act is ambiguous with respect to the reviewability of administrative scope determinations, resort to the Act's legislative history is justified. See, *e.g.*, *McDaniel* v. *Sanchez*, 452 U.S. 130, 146-147 (1981). That history establishes that key supporters of the legislation envisaged judicial review of administrative scope certifications.

During House committee hearings on the Reform Act, Representative Frank, a co-sponsor of the bill and the chairman of the subcommittee conducting the hearings, stated his understanding that "the plaintiff would still have the right to contest the certification if they thought the Attorney General were certifying without justification." *House Hearings* 128; see *id.* at 197. Shortly thereafter, Deputy

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court may determine that an employee is not entitled to that defense does not undercut its continuing jurisdiction over a case. As this Court has recognized in the context of pendent jurisdiction, as long as a federal issue sufficient to sustain jurisdiction is present when a case is brought to federal court, the court may constitutionally adjudicate the case as a whole. See *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966). Cf. *Mesa* v. *California*, 489 U.S. 121, 133, 136 (1989) (recognizing that federal immunity defense is sufficient to sustain federal jurisdiction).

Assistant Attorney General Willmore, who was testifying on behalf of the Department, expressed his agreement with Representative Frank's view, stating, "Chairman Frank is correct that a plaintiff can challenge that certification. So that would be reviewable by a court at some point, probably by a Federal District Court." *Id.* at 133. Nothing in the legislative history contradicts this understanding, and it is squarely on point. See Pet. App. 34a-38a; *Arbour* v. *Jenkins*, 903 F.2d 416, 421 (6th Cir. 1990).[6]

On balance, it is our view that the court of appeals' interpretation is the better of the two possible constructions. That interpretation is literally consistent with all of the language of Section 2679(d); it gives effect to the qualification—"for purposes of removal"—in the only provision that expressly addresses the conclusive effect of scope certifications; it represents a reasonable accommodation among the interests of all concerned; and it finds substantial support in the presumption in favor of judicial review of administrative action and in the legislative history.

b. Contrary to petitioner's suggestion (*e.g.*, Pet. 15-16), there is no conflict among the circuits calling for this Court's review. The court of appeals' determination that a scope determination by the Attorney General is subject to judicial review is in accord with decisions of five other circuits. See *Nasuti* v. *Scannell*, 906 F.2d 802, 812-813 (1st Cir. 1990);

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[6] As several courts have noted, the Department's change in position on the conclusiveness of scope determinations was based, in substantial part, on its reevaluation of this legislative history. See Pet. App. 27-28 n.1.

The only pertinent passage in the committee report on the Reform Act, H.R. Rep. No. 700, 100th Cong., 2d Sess. 9 (1988) (quoted at Pet. 29), does not address the conclusiveness of administrative scope certifications. Contrary to petitioner's contention, that passage does nothing to resolve the ambiguity in the text of the Reform Act in petitioner's favor. There was no other committee report, and the discussions on the floor of both Houses did not address the matter.

Melo v. *Hafer*, 912 F.2d 628, 640-642 (3d Cir. 1990), cert. granted, 111 S. Ct. 1070 (1991);[7] *Johnson* v. *Carter*, No. 90-3077 (4th Cir. July 8, 1991); *Arbour* v. *Jenkins*, 903 F.2d 416, 421 (6th Cir. 1990); *Hamrick* v. *Franklin*, 931 F.2d 1209, 1210-1211 (7th Cir. 1991). See also *McHugh* v. *University of Vermont*, 758 F. Supp. 945, 950 (D. Vt. 1991), appeal pending, No. 91-6062 (2d Cir.). The two decisions on which petitioner relies, *Mitchell* v. *Carlson*, 896 F.2d 128 (5th Cir. 1990), and *Aviles* v. *Lutz*, 887 F.2d 1046 (10th Cir. 1989), did not hold to the contrary.

In *Mitchell*, the plaintiff's claims arose from an alleged assault occurring in the course of "a heated work-related conversation" with her supervisor. 896 F.2d at 130. The U.S. Attorney certified that the supervisor had been acting within the scope of her employment during the time of the incident, and the district court initially substituted the United States as the defendant. When the United States moved to dismiss the action on the basis of an FTCA exception for assault or battery claims (28 U.S.C. 2680(h)), however, the district court reversed field, granted a motion to resubstitute the supervisor, and remanded the action to state court. The sole basis for the order was the district court's ruling that the Reform Act should not apply to a claim that, because of an FTCA exception, could not be pursued against the United States. *Mitchell* v. *United States*, 709 F. Supp. 767, 769-770 (W.D. Tex. 1989). The plaintiff did not challenge the correctness of the scope certification in that court.

The only issue before the Fifth Circuit under the Reform Act, therefore, was whether a valid certification requires substitution of the United States when the effect is to require dismissal of the action. Anticipating this Court's decision in *United States* v. *Smith*, *supra*, the Fifth Circuit held

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[7] The questions presented in *Melo* do not involve the Reform Act.

that the Reform Act is fully applicable in that situation. The court concluded (896 F.2d at 136):

> We thus find that the district court improperly resubstituted [the supervisor]. Once certified as acting within the scope of her employment, under the [Reform] Act the district court was *required* to substitute the United States for Carlson, and treat the case as a claim under the FTCA.

This passage was clearly limited to the scope certification before the court. Because the plaintiff had not sought review of that scope certification, the court's opinion cannot fairly be read as expressing any opinion on the availability of such judicial review.

Similarly, in *Aviles* v. *Lutz*, the Tenth Circuit held that the Reform Act requires substitution of the United States, upon a valid certification, regardless of whether the plaintiff's claims may be pursued against the United States. In the course of explaining the basis for its conclusion, the court observed that "[t]he mandatory language of [28 U.S.C. 2679(d)] does not permit us to challenge the attorney general's certification." 887 F.2d at 1049. It is not entirely clear that the court was referring to the type of "challenge" at issue in the instant case. As in *Mitchell*, the plaintiff had not contested the scope certification as such, and the court's observation was sandwiched amid discussion of the question whether the Reform Act applies to claims subject to FTCA exceptions. But in any event, any statement directed at the conclusiveness of scope certifications was *dictum*.

Particularly in view of the consensus among the courts of appeals that have expressly addressed the reviewability of scope certifications, the Fifth and Tenth Circuits are very unlikely to regard *Mitchell* and *Aviles* as controlling on that question. Indeed, district courts in both circuits have concluded that those decisions do not foreclose judicial review

of scope certifications.[8] There is no conflict warranting this Court's attention.

2. Petitioner contends that the court of appeals should have stricken the portion of the United States' brief that addressed the reviewability of scope certifications; in his view, the government was required to file a cross-appeal to challenge the district court's reasoning. Pet. 38-40.

As the court of appeals found (Pet. App. 28 n.2), the government was fully justified in following the course it did. Because it was seeking affirmance of the district court's judgment, the United States was not required (and may well not have been permitted) to file a cross-appeal. See *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326, 333 (1980). As an appellee, the United States was entitled to assert any legal ground in support of the district court's judgment, *Colautti* v. *Franklin*, 439 U.S. 379, 397 n.16 (1979), and to make the court of appeals aware of its position on all of the issues presented in the appeal. In any event, review of this question would be a meaningless exercise; even if petitioner is correct, reversal of the court of appeals' ruling on the motion to strike would not entitle petitioner to any relief from the judgment on the merits.

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[8] See *Cox* v. *Tulane University*, No. 90-4684 (E.D. La. Apr. 19, 1991); *Vu* v. *Meese*, 755 F. Supp. 1375, 1383 (E.D. La. 1991) (indicating the need for further district court proceedings on scope issues); *Jackson* v. *United States*, 751 F. Supp. 911, 913 (D. Colo. 1990). But see *Fair* v. *Swanson*, 753 F. Supp. 875, 877 (D. Colo. 1991).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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